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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

SHELDON R. TELLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Sheldon R. Teller, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit affirming his judgment of conviction of the sale, barter, exchange of heroin to another, not pursuant to the required written order in violation of Title 26, U.S.C. Section 4705(a) (Count I); the receipt, concealment and sale, and the

facilitation thereof of the same narcotics on the same date, in violation of Title 21, U.S.C., Section 174 (Count II); the receipt, concealment, and sale, and the facilitation thereof, of heroin, marijuana and cocaine on another occasion, in violation of, respectively, Title 21, U.S.C., Section 174, Section 176(a) and Section 174 (Counts III, IV and V).

In Counts I and II, he was charged and convicted together with a co-defendant, one John D. Sullivan. On Counts III, IV and V, he was charged and convicted alone.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition (App. 1).

Jurisdiction

Judgment of the Court of Appeals was entered on June 13, 1969 (App. 13). A timely Petition for Rehearing was denied on July 7, 1969 (App. 14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented For Review

1. Where a State Statute does not offend against any of the first eight Amendments to the Constitution of the United States, can Federal Courts, in effect, void the effectiveness of the State law as to Federal agents and courts within its boundaries, and is not such voiding contrary to the Ninth and Tenth Amendments to the Constitution of the United States? (*Griswold* v. *Connecticut,* 381 U.S. 479).

2. Where citizens of the sovereign State of Illinois, through their legislative representatives, have out-lawed electronic eavesdropping, does not this decision of the

lower court, which repeals the State Statute where federal offenses are concerned, offend against the Ninth and Tenth Amendments to the Constitution of the United States?

3. In Illinois, where its citizens have, in their regard for their "right of privacy," passed a statute forbidding electronic eavesdropping without the consent of ALL parties to the communication, can federal courts repeal such a law by holding its terms not applicable to federal agents and courts within the State's boundaries, and still conform to the requirements of the Ninth and Tenth Amendments?

4. Do not the Ninth and Tenth Amendments protect the rights of citizens of the sovereign State of Illinois to pass laws relating to police power — laws which are not contrary to the first eight amendments to the Constitution of the United States — and to have such laws obeyed by federal agents and respected by federal courts?

5. Can federal courts permit federal agents to violate State laws against eavesdropping on the basis that this court's rules —"procedural" in express intent — repeal the substantive law of the State of Illinois?

6. Does an affidavit on which a search warrant issues, which recites no factual basis to believe "certain property, namely money" will be found on residential premises satisfy the Fourth Amendment?

7. Where an affidavit on which a search warrant issues recites no basis for believing an identified informant and no corroboration of his information, is the reasonable cause requirement of the Fourth Amendment satisfied?

Constitutional Provisions, Statutes and Rules Involved

Amendment IX, Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X, Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Chapter 38, Article 14, Illinois Revised Statutes, Section 14-1:

> "(a) Eavesdropping device.
>
> "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.
>
> "(b) Eavesdropper.
>
> "An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.
>
> "(c) Principal.
>
> "A principal is any person who:
>
> (1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his behalf."

Section 14-2:

"A person commits eavesdropping when he:

"(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

"(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device."

Section 14-4:

"Any person convicted of eavesdropping shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both, or imprisoned in the state penitentiary from one to two years."

Section 14-5:

"Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article."

Rule 26, Federal Rules of Criminal Procedure, Title 18, U. S. C.:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided

by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 57(b), Federal Rules of Criminal Procedure, Title 18 U. S. C.:

"(b) *Procedure not Otherwise Specified.* If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Statement of the Case

This petitioner was convicted on all counts of a five count indictment returned July 26, 1966, and described hereinbefore (A. 2-5). On September 26, 1966, a motion to suppress evidence seized on July 23, 1966 at 9736 South Longwood Drive, Chicago, Illinois (Petitioner's residence) was made on the ground that the warrant was insufficient, the property seized was not described, and for failure of probable cause for the issuance thereof (A. 5-7). On September 30, 1966, the government filed an answer to the motion generally denying the insufficiency and illegality and the want of probable cause alleged (A. 8-9). After hearing on October 31, 1966 (A. 18-35), the motion was denied (A. 33).

The trial proceeded forthwith and continued through November 10 of that year, upon which date a verdict of guilty as charged was returned as to this petitioner, judgment entered thereon, and concurrent sentences of eighteen years were imposed on each count (A. 10-11). He was denied bail pending appeal and has been incarcerated since that date (approximately 20 months).

This petitioner's Motion for Judgment of Acquittal notwithstanding the verdict, or, in the alternative, for a new trial was filed on November 16, 1966 (A. 12) and denied. This petitioner filed his Notice of Appeal to the United States Court of Appeals on November 22, 1966.

After the submission of briefs, the matter came on for argument before that Court on January 8, 1968, and on October 16, 1968, the United States Court of Appeals issued the following order:

> "The above cause was argued in this court on January 8, 1968, and submitted to the court for decision. For the reason that one of the questions in the above cause might be affected by this court's final determination of Nos. 16021-16022, United States of America v. James A. White, now under submission following an en banc hearing, IT IS ORDERED that the decision in the above cause on appeal be held in abeyance until the final determination of the case United States of America v. James A. White, or until further order of this court."

On January 7, 1968, the United States Court of Appeals for the Seventh Circuit, sitting en banc, approved and endorsed the prior holding in *White* of the three judge panel, holding:

> "On the basis of the constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment." (Op. 16021-16022, January 7, 1969, p. 14)

United States v. *White* is now pending before this Court on a grant of certiorari on the petition of the United States

(No. 46 (1024)), apparently on the basis of a conflict between the Seventh Circuit and the Second and Fifth Circuits (see pp. 3 and 4, Gov't Petition for Cert.), and/or that the "uninvited ear" rule in *Katz* v. *United States*, 389 U.S. 347, upon which *White* was principally decided should not be retroactively applied. See *Desist* v. *United States*, 349 U.S. 244.

Heeding the prospective application direction of *Desist*, the Court of Appeals for the Seventh Circuit found the law enunciated in *On Lee* v. *United States*, 343 U.S. 747, applicable to this case, and affirmed the conviction.

The Evidence

We have no basic quarrel with the summary of the evidence as propounded by the United States Court of Appeals in its opinion. Nor do we contest that the evidence — taken in the light most favorable to the government, if legally obtained — supports conviction. Therefore, we adopt as this statement, the evidence as that Court found it to be:

> "At 6:00 p.m. on July 14, 1966, Samuel Washington, a government informant, telephoned defendant Teller with narcotics agent Jackson listening on an extension phone. Later that evening narcotics agents searched Washington and equipped him with a Kel-set transmitter. Agent Jackson then drove Washington to the south side of Chicago. Washington met defendant Sullivan, got in his car and rode with him. While the two rode together, narcotics agent Hill overheard their conversation on a Kel-set receiver tuned to Washington's transmitter. Washington told Sullivan that he wanted to restock, and gave Sullivan $1,500 in currency whose serial numbers had been recorded by government agents. Sullivan responded that he would have to see

'Shelly' first. The two men arranged to meet the following day when Washington said he would have additional money.

"A week later Jackson listened to various telephone conversations between Washington and Teller during which they arranged a meeting later that night. Before this meeting Washington was again searched, equipped with a Kel-set transmitter, and given recorded currency. Washington met both defendants, told Teller that he wanted one-fourth of a 'kilo' of heroin, that he had $3,000, and asked when he could get it. Sullivan said it would be later, and Washington told defendants he would await their call at his motel room. Agent Hill overheard this conversation on his Kel-set receiver.

"The next day agent Jackson listened while Washington talked to each defendant on the phone. Teller told Washington he had not met him because narcotics agents were in the vicinity. Washington arranged to meet both defendants at the rear of another motel to which he had moved. Agent Jackson saw defendants drive to the meeting place in a police car and saw Teller get out and bend down near a pole at the rear of the motel. After they had driven away, Jackson went to the pole, picked up a rolled-up black sock, examined it and replaced it. The defendants soon returned. Washington, equipped with a Kel-set, entered their police car. Teller told Washington that he had the heroin and needed his money in order to 'cop' (restock) as he was out of the 'stuff.' He told Washington that his 'stuff' was at the base of the pole. Agent Hill overheard this conversation on his Kel-set receiver. Washington left defendants' police car, found the rolled-up sock, and delivered it to agent Jackson.*

* If it is not already apparent, Agent Jackson testified, in corroboration of the undercover Agent Washington, to the foregoing events. (Footnote added.)

"The Bureau of Narcotics determined, that same night, that the white powder inside a container in the sock was heroin. The agents obtained federal arrest and search warrants for defendants and their residences.* In a search of Teller's residence the next morning, agents recovered heroin, cocaine and marijuana, another rolled black sock containing narcotics, together with narcotics-making apparatus and more than $45,000 in currency, including that previously recorded by the agents, given to Washington and passed

* The affidavit on which the warrant for the search of this petitioner's residence issued read as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"BEFORE C. S. Bentley Pike, Chicago, Ill.

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr., Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U.S. Code.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

"Carl L. Jackson, a U. S. agt. informed complainant he saw the delivery of the narcotics.

"Complainant furnished Washington with the money. According to agts. Rendna and Hughes they observed said Teller in possession of narcotic paraphernalia on May 4, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotic Agent.

"Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner."

(Footnote ours, but in Opinion at App. 5-7).

by him to defendants. Simultaneously Sullivan's apartment was searched and agents there found several cards on which were recorded six automobile license numbers which had been assigned to narcotics agents." (App. 2-3).*

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* The affidavit on which the warrant issued for a search of the premises of petitioner's co-defendant (Counts I and II) read as follows:

"AFFIDAVIT FOR SEARCH WARRANT

"BEFORE C. S. Bentley Pike

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U. S. Code.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966.

/s/ Charles E. Hill.
Signature of Affiant,
Narcotics Agent.

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner."

(Footnote ours, but in Opinion at App. 7).

As to the over-heard phone conversations and the employment of the Kel-set (transmitter attached to Washington's person and received by Narcotics Agents), the Court of Appeals for the Seventh Circuit held:

> "The use of the Kel-set transmitter and receiver by agent Hill predates December 18, 1967, the retroactive limit of the rule in *Katz* v. *United States*, 389 U.S. 347 (1967), set by the Supreme Court in *Desist* v. *United States*, 349 U.S. 244 (1969). The Supreme Court in the *Katz* opinion departed from the 'trespass' theory of *On Lee* v. *United States*, 343 U.S. 747 (1952), testing the reasonableness of warrantless searches and seizures of informants' words. The *On Lee* rule consequently is the test of the unreasonableness of the use of the Kel-set before us. Under *On Lee*, since agent Hill did not trespass upon the persons or premises of defendants, his 'eavesdropping' did not violate defendants' constitutional rights. There was, therefore, no error in the district court's admission of agents' testimony.
> "This court on October 16, 1968 ordered decision on the appeal before us held in abeyance pending final disposition of the appeal in *United States* v. *White*, 405 F.2d 838 (1969). This court's opinion in the *White* appeal was filed January 7, 1969. The *White* decision was based principally on the Supreme Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which is not controlling here. The Supreme Court on April 8, 1969 granted certiorari applied for by the government in *White*. Despite the fact that granting of certiorari indicates that *White* is not final, it is our view that it would be imprudent to delay further decision in the appeal before us. The reasons are that we are convinced that no possible development with respect to *White* in the Supreme Court can influence our judgment we are now making in affirming the convictions here, and the necessity we feel of avoiding unnecessary delay in filing this opinion.

"We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin*, 372 F.2d 63 (7th Cir.), *cert. denied*, 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment." (App. 5)

Concerning the searches, that Court held:

"We see no merit in defendants' challenge of the district court's denial of their motions to suppress the fruits of the searches on the ground that the affidavits on which the warrants issued were insufficient to establish probable cause. The affidavits are signed by narcotics agent Hill, and substantially state his belief that there is concealed money, fruit of violation of the narcotics laws, at the defendant's residence; that he had information from Washington that Washington had paid Teller $3,000 for narcotics; that he was informed by agent Jackson that Jackson had seen the narcotics delivered; that he had furnished Washington with the money and Washington paid the $3,000 to Teller; and that other named agents informed him they had observed Teller in possession of narcotics paraphernalia. This reasoning also applies to defendant Sullivan.

" * * * We think Hill's affidavits enabled the Commissioner to perform his neutral and detached function of determining probable cause. The affidavit declared the source of Hill's information and the basis of his belief that the money was the fruit of narcotics law violations. More important it informed the Commissioner of the circumstances underlying the narcotics sale. He could have reasonably concluded that Washington was a reliable informant. We think this a common sense interpretation of the affidavits. *United States* v. *Ventresca*, 380 U.S. 102 (1965). We hold that the affidavits sufficiently showed probable cause and that there was no error in the district court's denial of the motion to suppress." (App. 5-7).

REASONS FOR GRANTING THE WRIT

1. The exercise of this Court's supervisory power is required by the Ninth and Tenth Amendments where the Court of Appeals for the Seventh Circuit has negatived as to federal officers and federal courts the applicability of a state statute which in no way offends against the first eight amendments to the Constitution of the United States.

2. This court should exercise its supervisory power over a decision of the Court of Appeals for the Seventh Circuit which adheres to the principles enunciated by this court in *On Lee* v. *United States,* 343 U.S. 747 (1952) which did not involve electronic eavesdropping in a State where such eavesdropping had been forbidden by statute, and which decision is contrary to a State of Illinois statute forbidding eavesdropping (enacted in 1961) and a decision of the Supreme Court of the State of Illinois permitting electronic monitoring only where all parties consent to it.

3. This Court should grant certiorari to review a decision of the Court of Appeals for the Seventh Circuit which was decided in a way in conflict with applicable decisions of the Court in *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *State of Texas,* 378 U.S. 108.

1 and 2.

We do not question that the circumstances here bring this case factually within the scope of *On Lee* v. *United States,* 343 U.S. 505.

The peculiarity in this case stems from the existence of a local law which prohibits the use of an electronic eavesdropping device "without the consent of any party

thereto" (Ch. 38, Sec. 14-2, Ill. Rev. Stats). This is not the fact in *On Lee.* The Illinois Supreme Court (the supreme law of this state) has interpreted its statute to mean that "any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him" (*People* v. *Kurth,* 34 Ill. 2d 387; 216 N.E. 2d 154, 158).

The State of Illinois has a unique status and its unique status has been recognized by this Court. Forecast by this Court's decision in *Lopez* v. *United States,* 373 U.S. 427, endorsing admission of relevant evidence except when obtained "by violating some statute," this Court, in *Berger* v. *United States,* 388 U.S. 41, recognized that Illinois prohibits "surreptitious eavesdropping by mechanical or electronic device," and does not even allow such eavesdropping under Court order (388 U.S. at 47-48). Of course, a state court's construction of a State statute is binding on this Court (388 U.S. at p. 68).

Totally ignoring the implications of these cases, and the mandate of the Tenth Amendment (the companion Amendment to the Ninth), the Court of Appeals for the Seventh Circuit held:

> "We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin,* 372 F.2d 63 (7th Cir.), *cert. denied,* 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment." (App. 5).

United States v. *Martin,* 7 Cir., 372 F.2d 63 held, with a simplicity defying intelligent description that, notwithstanding the mandate of State law:

> "The admissibility of evidence in federal criminal prosecutions is governed by Rule 26, F.R.Cr.P., which

> provides ' * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' This Rule does not make admissibility of evidence in federal courts dependent upon diverse state laws; rather, it seems to envision a uniform federal practice in all federal criminal cases." 372 F.2d at p. 66.

And, reasoned the Court of Appeals for the Seventh Circuit, since certain federal courts allow admission of Kel-set eavesdropping evidence, the expediency of uniformity demands Illinois conform in violation of its own statutes, so long as it envisions a federal case tried in federal courts. Illinois did not feel that way in *People* v. *Kurth:*

> "Many Federal cases and cases from other jurisdictions hold that if one party to a recorded conversation consents to the recording the evidence is admissible, even though the consenting party is the one who is making the recording or carrying a concealed transmitting device without the knowledge of the other parties. These authorities are of little assistance to us in construing the above provisions for they do not involve a statute in any way similar to the one in this case." 216 N.E.2d at 158.

There are no statutes of the United States, nor express rules of this Court which govern eavesdropping evidence. There are no principles of the common law to guide its admission or exclusion, such devices being unknown to the common law. More precise than the generalities of Rule 26 are the proscriptions of Rule 57(b) which allows any procedure not inconsistent with any applicable statute. Or, more directly put, forbids any procedure at odds with an applicable statute. That is precisely what obtains here.

The procedure offends duly enacted statutes. We do not believe it was the intention of this Court, in enacting its procedural rules, to assert the power of repeal of any State legislature. We do not think this Court so intends. Almost thirty years ago, this Court denied any such suggestion:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts." (*Sibbach* v. *Wilson & Co.*, 312 U.S. at pp. 9-10).

We recognize *Sibbach* was a civil case, but we think the reasoning apposite. This Court, by its Rules, has never essayed to declare substantive state law, or to repeal it.

We think that *On Lee*, insofar as it relies on *Olmstead* v. *United States*, 277 U.S. 438, 468, in holding that "violation of state law . . . would not render the evidence obtained inadmissible in federal courts" (343 U.S. at 754), is overruled by this Court's decision in *Berger* v. *State of New York*, see Justice Douglas' concurring opinion, 388 U.S. at p. 64. We also submit such overruling is patently correct, as such *obitur* in *On Lee* (quoted *supra*), constitutes a diminishment of the Tenth, and necessarily the Ninth, Amendments. As Mr. Justice Frankfurter said in his dissent in *On Lee:*

> "What is perhaps even more noteworthy is its pervasive disregard in practice by those who as law officers owe special obedience to law. What is true of the federal Act against wiretapping and its violations is widely true of related state legislation and its disobedience." 343 U.S. at 759.

Is there any difference between a State trespass violation and this? (Compare Mr. Justice Burton's dissent, 343 U.S. at 765).

The eavesdropping statute of the State of Illinois offends against none of the first eight amendments. The ninth and tenth amendments were enacted to protect the citizens of the State of Illinois, as well as her sister states. They constitute an independent source of rights protected from infringement by the federal government. (See Justice Goldberg's concurring opinion in *Griswold* v. *State of Connecticut*, 381 U.S. at 492-3).

It is not for this Court, by its rules or otherwise to substitute its beliefs for the judgment of state legislative bodies (idem, at p. 496). This Court, and no federal court sits "to determine the wisdom, need and propriety of laws which touch economic problems, business affairs, or social conditions." (*Griswold* v. *State of Connecticut*, 381 U.S. 479, 482).

If this Court's grant of certiorari in *United States* v. *White* (No. 46 (1024)) was based on the grounds asserted by the government in its Petition therefor (a simple conflict in decisions between the Seventh and the Second and Fifth Circuits), it proceeds on a false postulate. There are no states in either the Fifth or the Second Circuits that have a statute comparable to that of Illinois.

We urge this Court grant certiorari in this case — preferably as a companion case with *White* — for a complete exploitation of the serious constitutional questions involved.

3.

An examination of the affidavit reveals the following serious and basic defects. First, Samuel Washington obviously is not an agent or at least he is not so described to be an agent. Under the law in *Jones* v. *United States*, 362 U.S. 257, there is no indication that, if he were ever before an informant, he had previously given accurate information. The basis for accepting Samuel Washington's statement is not set forth His story was not corroborated by other sources of information. There is no statement in the search warrant as to where he paid Sheldon R. Teller the sum of $3,000. The affidavit merely states that Sheldon R. Teller was an occupant of the premises. Moreover the payment, if any, occurred on July 21, 1966 and the affidavit for the warrant is dated July 23, 1966. There is no indication on the face of the affidavit as to whether or not the money was paid at the premises which would give rise to some "suspicion" that the money might still be there. But it cannot be assumed that the payment was at the premises and that, therefore, the money "probably" was still there.

The second sentence states that Carl L. Jackson, a narcotic agent, informed the complainant, who is Charles Hill, that he, Jackson, saw the delivery of the narcotics. The affidavit does not state that Teller delivered the narcotics. The affidavit does not state that the delivery had anything to do with the premises to be searched. That statement in no way connects either Teller or the premises with the delivery of any narcotics.

The next sentence indicates that the complainant, who is Charles Hill, furnished Washington with the money. There is nothing in that statement which in any way connects Teller or the premises with the sum of $3,000. It does not

even appear from the affidavit that the money was recorded in which case it could be identified as "fruits of a crime".

The last sentence states that two agents observed Teller in possession of narcotic paraphernalia on *May 4, 1966.* This, of course, has nothing to do with the premises. The words narcotic paraphernalia are not otherwise described.

The court below overlooked a very important, and basic, point of argument in this cause in that it ignored the requirement that there must be stated in any application for search warrant sound reason for believing the fruits, instrumentalities or, possibly even evidence of crime, will be found on the premises, so lately re-enunciated in *Spinelli* v. *United States,* 393 U.S. 410.

The affidavit filed by Agent Hill of the Federal Bureau of Narcotics, asking for the issuance of a warrant is set forth at pages 4 and 5 of the Court's opinion. (App. A, 5-7)

That affidavit will be examined in vain for any basis upon which Mr. Hill swore he reasonably believed that "money which is the fruit of a crime" was to be found on the premises searched. Moreover the alternative affidavits, naming Teller's premises in one search warrant and Sullivan's premises in another, bespeaks an uncertainty further implementing the lack of probable cause.

A reasonable ground for belief that fruits or instrumentalities of crime will be found on the premises is the very basis of the authority necessary to issue any search warrant. This Court in *Aguilar* v. *State of Texas,* 378 U.S. 108, made that point eminently clear where it stated at Page 114:

> "The magistrate must be informed of some of the underlying circumstances from which the informant

> concluded that *the narcotics were where he claimed they were . . .*" *Aguilar* v. *State of Texas,* 378 U.S. 108, 114. (Emphasis Ours.)

No place in the Affidavit for the Search Warrant does Mr. Hill even hint the premise upon which he swore that he has "probable cause to believe" that "money which is the fruit of a crime" was on those premises.

This warrant is the absolute equivalent of the obnoxious writs of assistance which authorized the examination of ships and vessels and persons found therein for the purpose of finding goods prohibited to be imported or exported, or on which the duties had not been paid; and to enter into and search any suspected vaults, cellars or warehouses for such goods.

If privacy is going to be invaded under warrant to search for fruits and instrumentalities of crime, probable cause must be shown to the magistrate that he might reasonably believe that the fruits and instrumentalities are on the premises. Whether or not the fruits and instrumentalities are in fact on the premises is immaterial as we know from so many abortive searches, but there must be a base on which to satisfy the probable cause requirement of our Constitution that they will be found on the premises. That is the very nexus of the Fourth Amendment to the Constitution of the United States. This warrant issued on nothing more than Mr. Hill's belief or suspicion that contraband would be found on the premises. No authority exists for breaching the security and privacy insured under the Constitution upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

The sustaining of the validity of the warrant in this case strikes at the very core of constitutionality secured privacy.

As this Court said in *Byars* v. *United States,* 273 U.S. 28, at page 29:

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the 4th Amendment and the laws of the United States."

These principles were reaffirmed by this Court recently in *Spinelli* v. *United States,* 393 U.S. 410.

Conclusion

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN
ANNA R. LAVIN
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 16047
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHELDON R. TELLER and JOHN D. SULLIVAN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1969

Before SCHNACKENBERG,[1] KILEY and FAIRCHILD, *Circuit Judges.*

[1] An original draft opinion was written by the late Elmer J. Schnackenberg and submitted to the judges who join in this opinion. Judge Schnackenberg died on September 15, 1968. On October 16, 1968, this court ordered this appeal held in abeyance until the final determination of *United States* v. *White*, 405 F.2d 838 (7th Cir. 1969), which was filed on January 7, 1969. We re-used somewhat his draft opinion, and have reached the same result except that we have treated differently the constitutional questions on the use of the Kel-set.

PER CURIAM. Defendants, Chicago police officers,[2] have appealed from their jury convictions, of selling and transporting narcotics in violation, respectively, of 26 U.S.C. § 4705(a)[3] and 21 U.S.C. § 174.[4] Teller individually appeals from his conviction of three similar offenses under 21 U.S.C. §§ 174 and 176(a)[5]. We affirm.

At 6:00 p.m. on July 14, 1966, Samuel Washington, a government informant, telephoned defendant Teller with narcotics agent Jackson listening on an extension phone. Later that evening narcotics agents searched Washington and equipped him with a Kel-set transmitter. Agent Jackson then drove Washington to the south side of Chicago. Washington met defendant Sullivan, got in his car and rode with him. While the two rode together, narcotics agent Hill overheard their conversation on a Kel-set receiver tuned to Washington's transmitter. Washington told Sullivan that he wanted to restock, and gave Sullivan $1,500 in currency whose serial numbers had been recorded by government agents. Sullivan responded that he would have to see "Shelly" first. The two men arranged to meet the following day when Washington said he would have additional money.

A week later Jackson listened to various telephone conversations between Washington and Teller during which they arranged a meeting later that night. Before

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[2] The indictment named both defendants in counts 1 and 2, and Teller alone in counts 3 through 5.

[3] The unlawful sale, barter or exchange of heroin.

[4] Fraudulent and knowing receipt, concealment, and facilitation of transportation and sale of heroin.

[5] Fraudulent and knowing receipt, concealment and facilitation of transportation of marijuana.

this meeting Washington was again searched, equipped with a Kel-set transmitter, and given recorded currency. Washington met both defendants, told Teller that he wanted one-fourth of a "kilo" of heroin, that he had $3,000, and asked when he could get it. Sullivan said it would be later, and Washington told defendants he would await their call at his motel room. Agent Hill overheard this conversation on his Kel-set receiver.

The next day agent Jackson listened while Washington talked to each defendant on the phone. Teller told Washington he had not met him because narcotics agents were in the vicinity. Washington arranged to meet both defendants at the rear of another motel to which he had moved. Agent Jackson saw defendants drive to the meeting place in a police car and saw Teller get out and bend down near a pole at the rear of the motel. After they had driven away, Jackson went to the pole, picked up a rolled-up black sock, examined it and replaced it. The defendants soon returned. Washington, equipped with a Kel-set, entered their police car. Teller told Washington that he had the heroin and needed his money in order to "cop" (restock) as he was out of the "stuff." He told Washington that his "stuff" was at the base of the pole. Agent Hill overheard this conversation on his Kel-set receiver. Washington left defendants' police car, found the rolled-up sock, and delivered it to agent Jackson.

The Bureau of Narcotics determined, that same night, that the white powder inside a container in the sock was heroin. The agents obtained federal arrest and search warrants for defendants and their residences. In a search of Teller's residence the next morning, agents recovered heroin, cocaine and marijuana, another rolled black sock

containing narcotics, together with narcotics-making apparatus and more than $45,000 in currency, including that previously recorded by the agents, given to Washington and passed by him to defendants. Simultaneously Sullivan's apartment was searched and agents there found several cards on which were recorded six automobile license numbers which had been assigned to narcotics agents.

The foregoing statement of events is from the evidence taken favorably to the government for which Washington was the principal witness. There is no contention that the evidence does not sustain the convictions. The contentions are, principally, that admission into evidence of testimony of agents of what was heard by use of the Kel-set device and of material seized in search of the residences was a violation of defendants' constitutional rights.

The use of the Kel-set transmitter and receiver by agent Hill predates December 18, 1967, the retroactive limit of the rule in *Katz* v. *United States,* 389 U.S. 347 (1967), set by the Supreme Court in *Desist* v. *United States,* 349 U.S. 244 (1969). The Supreme Court in the *Katz* opinion departed from the "trespass" theory of *On Lee* v. *United States,* 343 U.S. 747 (1952), testing the reasonableness of warrantless searches and seizures of informants' words. The *On Lee* rule consequently is the test of the unreasonableness of the use of the Kel-set before us. Under *On Lee,* since agent Hill did not trespass upon the persons or premises of defendants, his "eavesdropping" did not violate defendants' constitutional rights. There was, therefore, no error in the district court's admission of agents' testimony.

This court on October 16, 1968 ordered decision on the appeal before us held in abeyance pending final disposition

of the appeal in *United States* v. *White*, 405 F.2d 838 (1969). This court's opinion in the *White* appeal was filed January 7, 1969. The *White* decision was based principally on the Supreme Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which is not controlling here. The Supreme Court on April 8, 1969 granted certiorari applied for by the government in *White*. Despite the fact that granting of certiorari indicates that *White* is not final, it is our view that it would be imprudent to delay further decision in the appeal before us. The reasons are that we are convinced that no possible development with respect to *White* in the Supreme Court can influence our judgment we are now making in affirming the convictions here, and the necessity we feel of avoiding unnecessary delay in filing this opinion.

We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin*, 372 F.2d 63 (7th Cir.), *cert. denied*, 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment.

We see no merit in defendants' challenge of the district court's denial of their motions to suppress the fruits of the searches on the ground that the affidavits on which the warrants issued were insufficient to establish probable cause. The affidavits[6] are signed by narcotics agent Hill,

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[6] The affidavits read as follows:

AFFIDAVIT FOR SEARCH WARRANT

BEFORE C. S. Bentley Pike, Chicago, Ill.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr. Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being con-

and substantially state his belief that there is concealed money, fruit of violation of the narcotics laws, at the defendant's residence; that he had information from Washington that Washington had paid Teller $3,000 for narcotics; that he was informed by agent Jackson that Jackson had seen the narcotics delivered; that he had furnished Washington with the money and Washington paid the $3,000 to Teller; and that other named agents informed him they had observed Teller in possession of narcotics paraphernalia. This reasoning also applies to defendant Sullivan.

This court's decision in *United States* v. *Whitlow,* 339 F.2d 975 (7th Cir. 1964), is of no aid to defendants. The affidavit there was based on the "rankest sort of hearsay." *Id.* at 979. We think Hill's affidavits enabled the Commissioner to perform his neutral and detached function of determining probable cause. The affidavit declared the source of Hill's information and the basis of his belief that the money was the fruit of narcotics law violations. More important it informed the Commissioner of the circumstances underlying the narcotics sale. He

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cealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U. S. Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

Carl L. Jackson, a U. S. agt. informed complainant he saw the delivery of the narcotics.

Complainant furnished Washington with the money. According to agts. Rendina and Hughes they observed said Teller in posses-

could have reasonably concluded that Washington was a reliable informant. We think this a common sense interpretation of the affidavits. *United States* v. *Ventresca*, 380 U.S. 102 (1965). We hold that the affidavits sufficiently showed probable cause and that there was no error in the district court's denial of the motion to suppress.

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sion of narcotic paraphernalia on May 4, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotic Agent,

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE C. S. Bentley Pike

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U. S. Code.

An that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotics Agent.

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner.

Defendant Sullivan contends that the seizure of several index cards containing narcotics agents' license plate numbers from his apartment was outside the scope of the search warrant. The property specified in the search warrant was "money which is the fruit of a crime. . . ." The defendant has conceded, however, that an officer may seize items which are in plain sight in addition to those specified in a warrant. The agents performing the search noticed these cards on top of a dresser in Sullivan's apartment. Since they were on top of the dresser they were in plain view of the seaerching agents, and thus properly seized. The mere fact that these cards were evidentiary and not fruits or instrumentalities of the crime does not preclude them from being seized. *Warden* v. *Hayden*, 387 U. S. 294 (1967).

Sullivan claims prejudice arising from his misjoinder in indictment and trial with Teller. He relies upon *United States* v. *Spector*, 326 F.2d 345 (7th Cir. 1963). In *Spector* the conspiracy counts in the indictment were not based on the substantive counts, proof of the conspiracy counts was not of the same transaction as the substantive, and the conspiracy counts did not relate to the substantive counts. Clearly *Spector* has no application here. The several offenses charged here—sale, fraudulent and knowing receipt, transportation, and concealment—had a close connection, and it is apparent that the substantial rights of Sullivan were not prejudiced by the joinder. See *Schaffer* v. *United States*, 362 U.S. 511 (1960).

Teller claims that the district court was unduly restrictive in its ruling on the motion under 18 U.S.C. § 3500 for the production of statements of Washington, the main government witness. The court ordered production but, on the government's motion, deleted twelve

pages of one statement, and five paragraphs of a second, as unrelated to Washington's direct testimony. Before the deletion the district court made an in camera inspection of the documents, and the parts deleted were sealed and made part of the record on appeal. We have examined the deleted parts, and it is clear to us that defendants have not sustained their burden of persuading us that the parts deleted related to the direct examination of Washington. In the cases relied on by Teller, *Rosenberg* v. *United States,* 360 U.S. 367 (1959), *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), and *United States* v. *Cardillo,* 316 F.2d 606, 615 (2d Cir. 1963), the statements were related. Thus these cases are not in point.

Teller argues, in addition, that he was denied the use of certain tape recordings, made by the government, of Washington's telephone conversations with him. He alludes to testimony that a tape recording was made. The government denies that tape recordings were made and points out that the testimony referred to by defendant pertains to Washington's attempt to call Teller, and at that time Washington did not reach Teller. The government has expressly represented to the district court and to this court that no tape recordings were made of conversations between Washington and Teller. We accept the government at its word and hold that no error was committed.

When Washington was being cross-examined by counsel for Teller, the court sustained the government's objection to a question seeking to elicit Washington's "present" address. Teller contends this ruling was a "flagrant" abuse of his right of cross-examination under the rule of *Alford* v. *United States,* 282 U.S. 687 (1931).

He argues that he was prevented by the ruling from developing whether Washington was a government "captive" being accorded special treatment for his "cooperation."

Washington testified that he was staying at a motel at government expense at the time of the trial. He also disclosed where he lived four months before trial and at the time of the offense before us. He further testified to his use of a pseudonym, his cohabitation with a woman not his wife, his use of narcotics, his possession of narcotics in one of his three apartments at the time of the alleged offense, his dealing with thieves in the sale of stolen property, his conviction of burglary and arson, and his violations of probation and parole. He testified he had not been indicted for his part in the transaction with defendants, and that he expected to help himself by testifying for the government.

We think that neither *Alford* nor *Smith* v. *Illinois,* 390 U.S. 129 (1968), requires a reversal of this conviction. *Smith* does not per se require a new trial merely because the district court sustained an objection to a question seeking to elicit Washington's address. *Smith* requires reversal only where the lack of a witness's name and address denies a defendant an opportunity to effectively cross-examine a witness. When this happens, a defendant is denied his Sixth Amendment right to confrontation. However, the initial question is whether the defendant was denied effective cross-examination. It is clear from the recital of Washington's testimony that the district court did not unduly limit cross-examination of Washington's past record.

Moreover, nothing in *United States* v. *Garafalo,* 390 U.S. 144 (1968), requires reversal. In *Garafalo,* the government witness had not been permitted to testify

what his address was. On appeal, *United States* v. *Garafalo,* 385 F.2d 200 (7th Cir. 1967), this court independently examined the record and determined that defendant was not prejudiced by the lack of the government witness's address. However, this determination was made without the benefit of *Smith.* Subsequently, the Supreme Court vacated this court's judgment affirming the conviction and remanded to this court to reconsider in light of *Smith.* Significantly, it did not reverse the conviction. *United States* v. *Garafalo,* 390 U.S. 144. Subsequently, this court remanded to the district court to consider this question in a new trial. *United States* v. *Garafalo,* 396 F.2d 952 (7th Cir. 1968). The *Smith* issue was not determined on remand in *Garafalo.*

We see no merit in the following miscellaneous errors asserted. The district court denied Teller's motion for mistrial because of an agent's volunteering—in response to the court's question why informer Washington was kept by the government in a motel—that "we are concerned for his safety." The court gave an adequate instruction to the two-thirds of the jury who heard the statement to disregard it. We think the realistic view is that any error was, as the district judge thought, "harmless." The court struck from the record an obscene statement attributed to Teller in an agent's testimony, and ordered the jury to disregard it. The obscenity itself in today's world could not have seriously shocked the jury or prejudiced Teller's fair trial on the ground that the jury may have inferred Teller was habitually profane. The 1965 license numbers of government automobiles, found in the search of defendant Sullivan's premises and introduced into evidence, were not immaterial to the alleged 1966 offenses. The court properly overruled Teller's objection based on the

best evidence rule to the testimony of the amount of money in excess of $45,000 counted in "two hours" at Teller's residence in execution of the search warrants. We see no reversible error in these rulings singly or together.

We have considered all questions raised and conclude that defendants were convicted in a fair trial.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, June 13, 1969

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge**
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SHELDON R. TELLER and JOHN D. SULLIVAN, *Defendants-Appellants.*	Appeal from the United States District Court For the Northern District of Illinois, Eastern Division

No. 16047

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

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* Judge Schnackenberg participated in the hearing of oral argument and the conference of the Judges above-named. He died prior to the issuance of this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, July 7, 1969

Before
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SHELDON R. TELLER and JOHN D. SULLIVAN, *Defendants-Appellants.*	Appeal from the United States District Court For the Northern District of Illinois, Eastern Division
No. 16047	

IT IS ORDERED that the petition for rehearing filed by Sheldon R. Teller in the above entitled cause be, and the same is hereby, DENIED.

On consideration of the petition of John D. Sullivan for a rehearing by the Court en banc in the above entitled cause, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of John D. Sullivan for a rehearing in the above entitled cause be, and the same is hereby, DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 435

JOHN D. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 436

SHELDON R. TELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1969. Petitions for rehearing were denied on July 7, 1969. The petitions for certiorari were filed on August 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavits for search warrants were sufficient (raised in both petitions).

2. Whether cards on which were written the license numbers of vehicles assigned to narcotics agents, in plain view at the time of the search, were properly seized although not described in the search warrant (raised in No. 435).

3. Whether *Katz* v. *United States,* 389 U.S. 347, should apply retrospectively in this case (raised in No. 435).

4. Whether state law should determine the admissibility of evidence obtained by electronic overhearing of oral and telephone conversations with the consent of one of the participants (raised in No. 436).

5. Whether petitioner Sullivan was properly denied a severance (raised in No. 435).

RULE INVOLVED

Rule 8, F.R. Crim. P., provides as follows:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions con-

stituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of Illinois, petitioners were convicted (1) of selling heroin not in pursuance of a written order, in violation of 26 U.S.C. 4705(a), and (2) of receiving, concealing, etc., such heroin with knowledge of its unlawful importation, in violation of 21 U.S.C. 174. In addition, petitioner Teller was convicted of three narcotics offenses on which he alone was charged, violations of 21 U.S.C. 174 and 21 U.S.C. 176a. Teller was sentenced to concurrent terms of imprisonment for eighteen years and Sullivan to concurrent terms for nine years (T. App. 2–5, 10–12; S. App. 3–4)[1]. The court of appeals affirmed.

The relevant facts, which are not in dispute, are stated in the opinion of the court of appeals.[2] Petitioners were Chicago police officers. Their conversations with Washington, an informant, were overheard

[1] "T. App.", "T. Pet.", and "T. Pet. App." designate Teller's appendix in the court of appeals, his petition for certiorari, and the appendix to his petition. Similar abbreviations for Sullivan's documents are prefixed by "S.".

[2] The court's statement is adopted verbatim by Teller (T. Pet. 8–13). Sullivan does not question its accuracy, but gives more details, citing the trial transcript which has not been filed. We believe that the court's statement is adequate, here repeating its substance.

electronically by narcotics agents with Washington's consent. On July 14, 1966, Washington told Sullivan that he wanted to restock and gave Sullivan $1,500 in currency whose serial numbers had been pre-recorded. Sullivan said that he would have to see "Shelly" first. On July 21, Washington met both petitioners. He told Teller that he wanted one-fourth of a kilo of heroin and said that he had $3,000. Sullivan said that he could get it later. Washington said that he would await their call at his motel room. On the following day, Teller told Washington, by telephone, that he had failed to meet him because narcotics agents were in the vicinity. Washington agreed to meet petitioners behind his motel. Agent Jackson saw petitioners arrive at this spot in a police car. Teller got out and bent down near a pole. After they had driven away, Jackson went to the pole and found at its base a rolled black sock. Petitioners returned and Washington joined them in the police car.

Teller told Washington that his "stuff" was at the base of the pole and Teller needed his money to restock. Washington left the car, found the sock and delivered it to agent Jackson. The sock contained heroin. On the next day, July 23, the agents obtained federal arrest warrants for petitioners and search warrants for their residences. Search of the Teller residence revealed heroin, cocaine, marijuana, another rolled black sock containing narcotics, narcotics-making apparatus, and more than $45,000 in currency, including that previously recorded by the agents.[3] At

[3] The exact amount of pre-recorded currency was $2,700 (T. App. 87).

Sullivan's apartment were found cards on which appeared the license numbers of six automobiles assigned to narcotics agents (T. Pet. App. 2–4).[4]

The court of appeals at first held this case in abeyance because of the pendency before it of *United States* v. *White,* 405 F. 2d 838, certiorari granted, 394 U.S. 957. Since *Katz* v. *United States,* 389 U.S. 347, upon which the court of appeals' opinion in *White* was based, was later held not retroactive (*Desist* v. *United States,* 394 U.S. 244), and the trial here had taken place before the decision in *Katz,* the court subsequently concluded that this Court's ultimate determination in *White* could have no effect on the present case. Accordingly, it rendered its opinion, affirming petitioners' convictions on June 13, 1969 (T. Pet. App. 4–5).

ARGUMENT

1. The affidavits for search warrant adequately supported the commissioner's finding that there was probable cause to believe that a felony was being committed on the premises in question.[5]

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[4] The cards, which were not listed in the search warrant, were found on top of a dresser in the bedroom (T. App. 90).

[5] The affidavit of agent Hill, dated July 23, 1966, relating to the Teller premises, alleged as follows (T. Pet. App. 5–7, n. 6):

The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr. Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U.S. Code.

[footnote continued]

The affidavit as to the Teller premises alleged that Teller was the occupant, that Washington had informed the affiant that he paid Teller $3,000 for narcotics on July 21, and that agent Jackson had observed the delivery of the narcotics. Although the affidavit thus failed to give all the details which could have been included, the allegation that agent Jackson had observed delivery of narcotics was alone sufficient to establish, for purposes of a search warrant, that a felony had been committed in his presence. Assuming that there remained any question of establishing the

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"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

"Carl L. Jackson, a U.S. agt. informed complainant he saw the delivery of the narcotics.

"Complainant furnished Washington with the money. According to agts. Rendina and Hughes they observed said Teller in possession of narcotic paraphernalia on May 4, 1966."

Hill's affidavit as to the Sullivan premises was as follows (T. Pet. App. 7):

The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U.S. Code.

"An (sic) that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1,500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966."

reliability of an informant to whom the agents had entrusted $3,000,[6] confirmation of his information was abundantly supplied when the narcotics were in fact delivered. It is true that the funds might have been placed elsewhere, but it was reasonably probable that at least a portion of them, so soon after the transaction, would be found at the place most secure and most readily accessible to this petitioner. The question, of course, is one of probabilities, not of evidence sufficient to convict. *Brinegar* v. *United States,* 338 U.S. 160.

Furthermore, the affidavit alleged that named agents had observed this petitioner in possession of narcotics paraphernalia some two and a half months previously. Although this alone was not of compelling significance, it was a circumstance which could properly be considered by the commissioner. *Id.* at 171–174; *Jones* v. *United States,* 362 U.S. 257, 271; *Rugendorf* v. *United States,* 376 U.S. 528, 537. Allowance must be made for the fact that affidavits are normally drawn by non-lawyers. *United States* v. *Ventresca,* 380 U.S. 102, 108–109; *Jones* v. *United States, supra,* 362 U.S. at 270. The commissioner could rightfully find from the affidavit submitted that the charges against this petitioner were "not capricious" and that the probabilities were substantial that the advance funds paid for the narcotics, or a part thereof, were to be found on the premises Teller occupied. *Jaben* v. *United States,* 381 U.S. 214, 224–225.

[6] This was the issue in *Spinelli* v. *United States,* 393 U.S. 410, up which petitioners apparently place principal reliance.

Similar observations are pertinent to the Sullivan search warrant. It was reasonable to believe that a portion of the money received for the joint enterprise would be found at this petitioner's residence. That money was not found does not impeach the legality of the search. *United States* v. *Di Re,* 332 U.S. 581, 595.

2. The cards on the top of Sullivan's dresser, bearing the license numbers of vehicles assigned to narcotics agents, were properly seized. Possessed of a valid warrant for search of the Sullivan premises, the officers were rightfully there. It has long been settled law, reiterated little more than a year ago, that objects falling in the plain view of an officer who has the right to be in a position to have that view are properly subject to seizure without a warrant. *Harris* v. *United States,* 390 U.S. 234, 236; *Ker* v. *California,* 374 U.S. 23, 42–43; *United States* v. *Lee,* 274 U.S. 559; *Hester* v. *United States,* 265 U.S. 57; *Gilbert* v. *United States,* 366 F. 2d 923, 932 (C.A. 9), certiorari denied, 388 U.S. 922; *United States* v. *Barone,* 330 F. 2d 543, 544–545 (C.A. 2), certiorari denied, 377 U.S. 1004. By definition, no search is involved in seeing an object plainly visible. It would be folly to require that, instead of taking it into custody, officers should ignore the existence of the object until a "search" warrant could be obtained, at which time the chances for its discovery would be slight.[7] Moreover, contrary to petitioner's

[7] This has not been changed, as urged in No. 435, by the decision in *Chimel* v. *California,* 395 U.S. 752, which limited the scope of a search without a warrant incident to a valid arrest.

contention (S. Pet. 31), the cards were instrumentalities of the crimes; their manifest purpose was to assist petitioner in concealing narcotics by evading the scrutiny of agents who might discover their traffic. Seized property need not be described in the warrant if the item in question is a means or instrumentality of the crime. See authorities collected in *United States* v. *Alloway*, 397 F. 2d 105, 110–111 (C.A. 6).

3. Sullivan also urges that the court of appeals should have applied retroactively its decision in *United States* v. *White*, 405 F. 2d 838, certiorari granted, 394 U.S. 957, No. 46, O.T., 1969. This petitioner, however, does not attempt to meet the reasoning of the court that, since its decision in *White* was based upon *Katz*, which has been held not to be retroactive, *White* could not be applicable to this case, which was tried before *Katz*. Since Washington testified for the government (S. Pet. App. 4), there is no issue in this case, as in *White*, of the unavailability of the person whose consent was obtained.

4. Teller asks that the Court grant review in connection with *White*, but on different grounds. His contention is that Illinois statute and case law should govern the admissibility of the evidence obtained by electronic means (T. Pet. 14–18). This same contention was raised in the brief in opposition to the petition for a writ of certiorari in *White*. But the court below was plainly correct in refusing to be governed by state law in this matter.[8] F. R. Crim. P. 26 pro-

[8] In any event, neither the action of the agents nor that of the informant was in violation of the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code of 1961),

vides that, except as otherwise provided by act of Congress or court rule, the admissibility of evidence shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.

The codification of these rules has been the purpose of the Committee on Rules of Practice and Procedure of the Judicial Conference and its Advisory Committee on Rules of Evidence, which has produced a comprehensive draft of such proposed rules, submitted in March of this year. While not attempting to cover the subject of exclusionary rules, the draft is an expression of the purpose to make uniform throughout the federal courts the practice as to the admission and exclusion of evidence. The question whether to exclude evidence because illegally obtained is also "one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins* v. *United States,* 364 U.S. 206, 224. And com-

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which proscribes the use of an eavesdropping device to hear a conversation "without the consent of any party thereto." In 1961, the Illinois Supreme Court held that an electronically-assisted overhearing does not violate this statute if consent is obtained from one of the parties to a conversation. *People* v. *Dixon*, 22 Ill. 2d 513, 177 N.E. 2d 224, certiorari denied, 368 U.S. 1003. While that court later overruled so much of the *Dixon* opinion that permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained, *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154, its ruling did not make this evidence inadmissible in a federal proceeding, and expressly rejected an argument that monitoring with the consent of only one party violated Illinois law.

pare *Benanti* v. *United States,* 355 U.S. 96. The Seventh Circuit consistently has held that the Illinois statute cited by Teller does not create a special rule. *United States* v. *Martin,* 372 F. 2d 63, 66, certiorari denied, 387 U.S. 919, and *United States* v. *Krol,* 374 F. 2d 776, 778, certiorari denied, 389 U.S. 835. See also, as to a comparable Oklahoma statute, *Ferguson* v. *United States,* 307 F. 2d 787, 789–790 (C.A. 10), vacated on motion of the government to remand on other grounds, 375 U.S. 962; *Rogers* v. *United States* (same case), 369 F. 2d 944, 947 (C.A. 10), certiorari denied *sub nom. Ferguson* v. *United States,* 388 U.S. 922.

5. Sullivan was properly joined with Teller in the indictment and trial of this case. Rule 8(b), F.R. Crim. P., provides that two or more defendants alleged to have participated in the same transaction or series of transactions "may be charged in one or more counts together or separately and *all of the defendants need not be charged in each count*" (emphasis added). Such was this case, with both petitioners shown to have acted together in the dealings which led up to the transfer of a quarter kilo of heroin on July 22. Teller alone was charged in the last three counts, based on the narcotics found at his residence on July 22. The trial court could properly find that there was no prejudice to Sullivan from the discovery of narcotics on the Teller premises. As the court observed (S. App. 11), the failure to find narcotics at Sullivan's residence might well be regarded as exculpatory of Sullivan. It was the record of the dealings jointly participated in by both petitioners which established

the case against Sullivan. The case presents no problem of statements or confessions by one defendant incriminating the other, inconsistent defenses, or the like. Neither petitioner testified or presented a defense. The trial court did not abuse its discretion. *Opper* v. *United States,* 348 U.S. 84, 95.

6. Neither petitioner has raised the issues which are before the Court this Term in *Minor* v. *United States,* No. 189, and *Turner* v. *United States,* No. 190, *i.e.,* whether a prosecution under 26 U.S.C. 4705(a) is subject to the defense of the privilege against self-incrimination or whether the statutory presumption created by 21 U.S.C. 174 is valid. The Court may nevertheless wish to defer action on the petition until its decision in those cases.

In all other respects, for the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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